STATE OF MICHIGAN

IN THE SUPREME COURT

* * * * * * * * * * * * *

MICHAEL J. BARNES, JR

Plaintiff - Appellee

v

KIM KRISTINE JEUDEVINE,

Defendant - Appellant, OK

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Supreme Court No. _____

Court of Appeals No. 252840 Opn 8/23/05

Trial Court File No.: F03-6657 DP
Kalamazoo
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APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

NOW COMES the above-named Defendant, and Appellant herein, Kim Kristine Jeudevine, by her attorneys, Butler, Durham & Toweson, PLLC and, pursuant to MCR 7.302 apply for leave to appeal to this Court the Unpublished Opinion of the Court of Appeals, dated August 23, 2005, a copy of which is attached hereto.

The issues herein involve legal principles of major significance to the state's jurisprudence, the decision of the Court of Appeals is clearly erroneous and will cause material injustice to the Appellant and conflicts with other decisions of this Court and the Court of Appeals, as will be more clearly set forth in the following concise statement of

facts and argument, otherwise identified as the Appellant's Brief In Support of its Application for Leave to Appeal.

BUTLER, DURHAM & TOWESON - PLLC

Dated: October 3, 2005

By: George T. Perrett (P42751)
Attorneys for Defendant/Appellant

STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. BARNES, JR,

Plaintiff-Appellant,

v

KIM KRISTINE JEUDEVINE,

Defendant-Appellee.

UNPUBLISHED
August 23, 2005

No. 252840
Kalamazoo Circuit Court
LC No. 03-006657-DP

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the order of the circuit court dismissing his paternity claim against defendant on the ground that he lacked standing. We reverse and remand for reinstatement of plaintiff's claim. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and her husband separated, and defendant began a relationship with plaintiff. Defendant's husband filed for divorce, and maintained that there were no children born of the marriage, and that none was expected. A default judgment was entered, reflecting defendant's position: "it further appearing that no children were born of this marriage and none are expected . . . ."

The judgment of divorce was entered on November 2, 1998. Nearly four months afterward, defendant gave birth to a son, who shares his surname with plaintiff. Defendant had made no mention of a pregnancy to her husband or to the trial court (she took no part in the proceedings below) while the divorce was pending. An affidavit of parentage, signed by the state registrar, attests that both parties in this action acknowledged plaintiff's paternity of the child by their signatures on February 27, 1999, according to "parentage facts on file in the Michigan Department of Community Health . . . ."

The parties discontinued their relationship, and plaintiff asserted parental rights. The trial court held that plaintiff lacked standing to assert parentage of a child presumably conceived during defendant's marriage to another man. The court recited caselaw establishing the strong presumption that the husband is the father, and concluded that the default divorce judgment terminating defendant's marriage did not actually determine the question of defendant's husband's paternity for purposes of allowing plaintiff to proceed with a paternity action.

We review a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Whether a party has standing to bring an action likewise presents a question of law, that we review de novo. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

The Paternity Act[1] confers standing on the father of a child born out of wedlock to sue to establish paternity. *McHone v Sosnowski*, 239 Mich App 674, 677; 609 NW2d 844 (2000); MCL 722.714(1) and (8). The act defines a child born "out of wedlock" as one "begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a). Under the second clause, standing to assert parentage requires an earlier judicial determination that the child is not an issue of the marriage. *McHone, supra* at 677-678.

At issue is whether the language in the default divorce judgment about there "further appearing that no children were born of this marriage and none are expected" constitutes a judicial determination that defendant's ex-husband is not the father of the child conceived during the marriage. We conclude that it does. The language of the judgment indicates that no children were born of the marriage, and that none were expected to be born.

"A default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). See also *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Respecting defaults, in their factual as well as legal components, is a function of the policy of respecting the finality of judicial judgments. See, e.g., *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). If the trial court's equivocation about there merely "appearing" to be no children of the marriage did indeed reflect the court's lack of opportunity to consider the factual matter fully, it nonetheless reflected no lack of legal authority behind the substance implicit in that unchallenged ruling.

Where a husband seeking a divorce decree expresses no knowledge whether a pregnancy is in progress, and the ensuing default judgment is then silent on the question of paternity, the issue of paternity is not determined for purposes of creating standing to assert paternity in a later action. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 176; 514 NW2d 522 (1994). The instant case, however, is distinguishable from *Baayoun*, in that here the divorce judgment does indeed address the question of paternity, effectively reciting that the husband was not responsible for any children. "The rule is well established that courts speak through their judgments and decrees . . . ." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

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[1] MCL 722.711 *et seq.*

In this case, the legal presumption that a child is factually the offspring of the mother's husband was answered, and repudiated by the language within the default judgment.[2] Plaintiff therefore had standing to bring this paternity action. *McHone, supra.*

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray

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[2] *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003) does not apply to this case. That case did not involve or contain any discussion about standing under the paternity act. Instead, it involved standing to intervene in a termination case. A subsequent case, not cited by either party, *In re KH, supra* does address standing under the paternity act, but in that case the plaintiff did not have a prior determination that the child was not born of the marriage. *In re KH, supra* at 632. Because of the standing definition under the paternity act, the default judgment determination grants plaintiff standing.

STATE OF MICHIGAN

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* * * * * * * * * * * * * *

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BRIEF OF APPELLANT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this Application for Leave to Appeal, pursuant to MCR 7.301(A)(2), after a decision issued by the Michigan Court of Appeals.

APPELLANT'S STATEMENT OF QUESTION INVOLVED

Whether the Court of Appeals improperly reinstated the Appellee's Complaint for Paternity, ruling that the Default Divorce Judgment, entered by the Trial Court, was a judicial determination that the minor child was a child born "out of wedlock" and was not issue of the Appellant's prior marriage and that, accordingly, the Appellee had standing to bring his complaint.

Appellant states: Yes

Appellee states: No

Court of Appeals: No

STATEMENT OF FACTS

Mr. James Vincent Charles and Ms. Kim Kristine Jeudevine ("Appellant") were married on July 11, 1996. Mr. Charles filed a divorce complaint, in pro per, in Kalamazoo County on or about July 9, 1998. (Exhibit 1 - Complaint for Divorce.)

Before being served with the summons and complaint for divorce, the Appellant discovered that she was pregnant. The Appellant never disclosed this fact to Mr. Charles, prior to entry of the Judgment of Divorce. Further, it is not disputed that the child was conceived during the marriage, as Appellant discovered she was pregnant in early June 1998, prior to Mr. Charles even filing for divorce.

The Appellant never answered the divorce complaint or appeared before the Kalamazoo County Circuit Court, due principally to the fact that there were no substantive disputes over property between the parties. A default Judgment of Divorce was, thereafter, entered on November 2, 1998.

It is not disputed that Mr. Charles was unaware that the Appellant was pregnant at the time of the divorce; hence, the resulting Judgment of Divorce entered stating that Appellant was defaulted and that "it further appearing that no children were born of this marriage and none were expected." (Exhibit 2 - Judgment of Divorce.)

On February 26, 1999, the minor child at issue in this matter was born. The Appellee, Michael Barnes, alleges that he is the father of the minor child.

At the time of the child's birth, the Appellant and Appellee herein signed an Affidavit of Parentage. Under oath, it falsely avers that the "mother," i.e. the Appellant, was not

married from the conception to the birth of the child. Appellant signed this Affidavit under duress from the Appellee.

The Appellee, Michael Barnes, filed a paternity action in the Kalamazoo County Circuit Court on or about September 25, 2003, after having previously filed a now-dismissed complaint for custody in Van Buren County and having separately filed a now-dismissed Motion to Intervene in the Appellant's divorce from her prior husband.

The Kalamazoo County Circuit Court, Hon. Carolyn Williams, presiding, dismissed the paternity complaint on November 26, 2003. The Appellee argued that this child was born out of wedlock and, accordingly, he had standing to bring his complaint for paternity. The facts, however, belied the Appellee's argument – the child was clearly conceived during the Appellant's prior marriage to Mr. Charles. Accordingly, the trial court ruled:

> "I think that one of the things that I need to make clear in my analysis of this situation is I take very seriously the presumption that a child born or conceived during a marriage, whether the parties are separated or not, is a child of that marriage and it certainly appears that all of the case law in the State of Michigan has operated on that same presumption.
>
> And further, the Michigan Supreme Court has said we will not allow anyone to go behind that information so long as there was a valid marriage at any time during the - - at the time of the birth or the gestation of that child. And I think that review was reinforced by the most recent decision, or that view was reinforced by the most recent decision in the Kaiser v Schreiber case because my understanding is that the Supreme - - the Michigan Supreme Court reversed the judgment of the Court of Appeals because it attempted to engage in this fictional analysis that once a judgment had been entered and there were facts that came to the Court's attention that the child was conceived by someone - - with someone other than the husband, that that was in effect, a judicial determination that the child was born out of - - was not a child of that marriage. I think the analysis that Mr. Gagie has given is one that was explicitly rejected by the Michigan Supreme Court.

> Furthermore, even if I were to accept his argument that somehow this default judgment constitutes a finding of some sort, my, my feeling is that when the Court speaks of a judicial determination, it means an affirmative finding by a judge based on evidence that judge heard about the status of the child and whether or not it was born or conceived out of wedlock.
>
> A default judgment basically asserts only those things that the moving party, who is acting unchallenged as, is assumed to be true because no one else has contested it. I don't think a default judgment, which recites some language about there not being children born of the marriage or, and that the wife is not pregnant to the best of the knowledge of the moving party is such an affirmative determination by a Court." (Exhibit 3 - Transcript of Judge Williams Bench Finding/Ruling, pp. 14-15).

The trial court found that the Appellee did not have standing to bring the complaint and, accordingly, dismissed it under MCR 2.116(c)(10).

The Court of Appeals denied Appellant's application for leave on April 30, 2004. The Appellant filed motion for reconsideration which was granted on June 21, 2004. In an unpublished decision, dated August 23, 2005, the Court of Appeal's reversed the trial court's dismissal of the Appellee's complaint for paternity and remanded for proceedings consistent with its opinion. (Exhibit 4 - Court of Appeals Unpublished Decision.) Appellant files her Application for Leave to Appeal from this Court of Appeal's decision.

ARGUMENT

I. WHERE THERE HAS BEEN NO AFFIRMATIVE JUDICIAL DETERMINATION THAT THE APPELLANT'S MINOR CHILD WAS A CHILD BORN OR CONCEIVED DURING HER MARRIAGE BUT NOT THE ISSUE OF THAT MARRIAGE, THE APPELLEE DOES NOT HAVE STANDING TO BRING HIS COMPLAINT UNDER THE PATERNITY ACT AND THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE APPELLEE'S COMPLAINT FOR PATERNITY.

Standard of Review

Appellate review of a motion for summary disposition is de novo. **Speik** v. **Department of Transportation**, 456 Mich 331, 337, 572 NW2d 202 (1998). As this appeal turns, largely if not exclusively, on the issue of whether the Appellee has standing to bring suit under the Paternity Act, appellate review on questions of standing are also reviewed de novo. **In re KH**, 469 Mich 621, 627-28, 677 NW2d 800 (2004).

As a general proposition, standing "relates to the position or situation of the plaintiff relative to the cause of action and the other parties at the time the plaintiff seeks relief from the court." **Department of Social Services** v. **Baayoun**, 204 Mich App 170, 514 N.W.2d 522 (1994), citing **Altman** v. **Nelson**, 197 Mich App 467, 475, 495 N.W.2d 826 (1992). In order to confer standing in a paternity matter under the Paternity Act MCLA 722.711(a) et seq., it must be alleged that the child was born out of wedlock. "Out of wedlock" means that the child is "begotten and born of a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

The Appellee, in the case at bar, can not establish that there was a court determination that this child is a child "born out of wedlock." Accordingly, he has no standing to bring his paternity action.

First, it is not disputed that the minor child was born to a woman who was, in fact, married at the time of conception. The Judgment of Divorce was dated November 2, 1998 and the minor child was born less than four (4) months later on February 26, 1999.

Second, where the trial court did not know of the existence of the pregnancy at the time of the divorce action, nor at any point prior to the entry of the default Judgment of Divorce, it is factually and legally impossible for the trial court to have identified and determined that the minor child in this matter was "a child born or conceived during a marriage but not the issue of that marriage." Hence, the Judgment of Divorce could not have resolved the issue of paternity of the minor child and can not constitute a judicial determination that the child was born "out of wedlock." Accordingly, the trial correctly ruled that the Appellee did not have standing to bring his action under the Paternity Act.

The Court of Appeals contrary ruling in this matter is clear error. It contradicts established precedent of this Court, e.g. **Girard** v **Wagenmaker**, 437 Mich. 231, 420 N.W.2d 372 (1991). Further, it seemingly contradicts other Court of Appeals cases which have addressed this issue.

Established precedent holds that an affirmative determination of paternity over an identified child is required to establish, and support an allegation, that a child was a child born "out of wedlock." Only in this circumstance will standing be conferred in an action under the Paternity Act.

In **Girard**, supra at 2, the putative father filed a complaint against Judy Wagenmaker, claiming he was the father of a child conceived and born while Ms. Wagenmaker was married to her husband, Harvey Wagenmaker. Mr. Wagenmaker intervened in the action and asserted his parental rights to the child, acknowledging that the child was conceived and born during the marriage and that he had always accepted and supported the child as his own. Ms. Wagenmaker filed a Motion for Summary Disposition, asserting that a prior determination of the Circuit Court was required to establish that the child was a child born "out of wedlock" before the Mr. Girard could contest paternity and that no such determination had ever been made. The trial court dismissed Mr. Girard's complaint and, as in the case at bar, the Court of Appeals reversed.

In overturning the Court of Appeals, this Court, in **Girard**, recognized that the pivotal legal determination centered on Girard's standing, or lack thereof, to file a paternity complaint. Like the case at bar, it was not disputed that the child was conceived during the marriage. Accordingly, the Court, as such, spent considerable time discussing the phrase ". . . which the Court has determined," as used in the alternative prong for the definition of "out of wedlock" under the Paternity Act. In its thorough analysis, this Court held that:

> "To meet the requirements of the second clause under the statutory definition, there must exist a child born out of wedlock – a child which the court has determined to be a child born during, but not the issue of, the natural mother's marriage. Using the common and approved usage of the terms in the statute, **Aikins**, supra, we find that a literal construction of this clause, coupled with the filing requirement clause, requires a prior court determination that a child is born out of wedlock.

> In the second clause of the born out of wedlock definition, the Legislature used the term "which the court has determined" to define one of the necessary requirements to find that a child is born out of wedlock. '[H]as determined' is the present perfect tense of the verb 'determine.' The present perfect tense generally 'indicates action that was started in the past and has recently been completed or is continuing up to the present time.' Sabin, ed., The Gregg Reference Manual (New York: McGraw-Hill, 6th ed, 1985), ch 10, p 192, or shows 'that a current action is logically subsequent to a previous recent action.' Ray & Ramsfield, Legal Writing: Getting It Right and Getting It Written (St. Paul: West Publishing Co., 1987), p. 229. For a putative father to be able to file a proper complaint in a circuit court, MCL §722.711(a); M.S.A. §25.491(a), a circuit court must have made a determination that the child was not the issue of the marriage at the time of filing the complaint. The facts in this case indicate Girard cannot meet this requirement. No previous action was ever undertaken to determine the child's paternity. . ." **Girard**, 437 Mich. at 242-43.

In analyzing and applying this Court's holding in **Girard**, as immediately set forth above, to the case at bar, it is axiomatic that a trial court has to have: 1) known of the existence of the child, either in utero or as born; and, 2) initiated and concluded an 'action' (i.e. consistent with the argument that the matter must be an affirmative and not a passive determination) to determine that a child was not an issue of a marriage, prior to the filing of the paternity complaint. For opinions consistent with Girard, see also **Kaiser** v **Schreiber**, 469 Mich. 944; 670 N.W.2d 671 (2003) [citing MCLA 722.21(a), MCLA 722.26(c)].

The Court of Appeals, in the absence of further appeal, would have these parties resolve that a "passive," boilerplate reference in default divorce judgment constitutes a "judicial determination of paternity" over a child, which the trial court didn't know existed, sufficient to confer standing on this Appellee to file a complaint for paternity. This ruling is not consistent with **Girard** in any respect.

In support of this proposition, the Court of Appeals cites **Perry & Derrick Co.** v **King**, 24 Mich App 616, 620; 180 N.W.2d 483 (1970), which states "[a] default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." Ordinarily, that's an accurate statement of the relevance and applicability of default judgments. However, in the case at bar, this Court in **Girard** and the Michigan legislature imposed a seemingly higher burden on the trial court, such that a default judgment can not possibly serve to constitute a judicial "determination" on the issue of "out of wedlock" status for a minor of which the trial court was not aware. As the trial court properly noted, an "affirmative" determination of this "status" is required.

The Appellant's position finds support in the Court of Appeal's own ruling in **Department of Social Services** v **Baayoun**, 204 Mich.App. 170, 514 N.W.2d 522 (1994). In **Baayoun**, the mother was four months pregnant when a default judgment, brought based on her husband's complaint for divorce, was entered. Eight years later, the DSS brought a complaint on behalf of the child under the Paternity Act, seeking a determination that Mr. Baayoun was the child's father.

In dismissing DSS's complaint, the **Baayoun** court held that a default judgment of divorce did not determine that child was not issue of marriage as to render a child a 'child born out of wedlock' within the meaning of the Paternity Act. "The default judgment of divorce is silent with regard to the question of paternity and child support, and it indicates that Joseph was not aware that Loretta was pregnant at the time. Thus, the divorce

judgment cannot be deemed to have determined the issue of paternity." **Baayoun**, 204 Mich App at 176.

The Court of Appeals, in the instant case, very ineffectively attempts to distinguish **Baayoun** on the basis that there was no reference to the question of paternity and child support in the **Baayoun** default judgment, but the Appellant's divorce judgment does "indeed" address the question of paternity. No, it does not. Applying **Girard**, in order to have addressed the issue of paternity, the default judgment necessarily must have recognized the existence of the child, of whom the plaintiff and the Court were unaware (like in **Baayoun**) and whose paternity it is said the Court thereafter resolved. The default divorce judgment in this case is as silent on the issue of paternity, relative to the minor child in question, as the default divorce judgment in **Baayoun**. In order to bootstrap its decision, the Court of Appeals attempts to create a distinction, without a functional difference.

The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law; hence, the rigors imposed by the Legislature and properly interpreted by this Court in **Girard** in order to establish standing to file a paternity action under the Paternity Act. The decision of the Court of Appeals, in reversing the trial court's dismissal of this matter, was clear error. This Appellee does not having standing to bring his paternity complaint, where the trial court (as it recognized) never made an affirmative determination that the minor child in this matter was, in fact, born "out of wedlock."

RELIEF REQUESTED

For the aforementioned reasons, the Appellant respectfully requests that this Court grant its Application for Leave to Appeal, reverse the Court of Appeals decision and dismiss the Appellee's paternity complaint under the Paternity Act and that Appellant be granted any and all further relief, including an award of attorneys fees and costs, as this Court may deem appropriate.

RESPECTFULLY SUBMITTED,

BUTLER, DURHAM, & TOWESON, PLLC

DATED: 10/3/05

George T. Perrett (P42751)
Attorney for Appellant

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